STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN CHIROPRACTIC COUNCIL and the MICHIGAN CHIROPRACTIC SOCIETY,

Petitioners/Appellees

vs.

COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICES,

Respondent

and

FARMERS INSURANCE EXCHANGE and MID-CENTURY INSURANCE COMPANY,

Intervening Respondents/Appellants

_____/

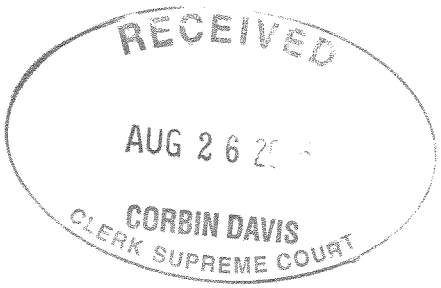
Supreme Court Docket Nos. 126530 and 126531

Court of Appeals Docket Nos. 241870 and 241874

Ingham County Circuit Court Case No. 01-93481-AA

AMICUS CURIAE BRIEF OF THE MICHIGAN STATE MEDICAL SOCIETY

PROOF OF SERVICE



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STATEMENT IDENTIFYING BASIS OF JURISDICTION

Jurisdiction exists in this Court pursuant to MCR 7.301(A)(2) and MCR 7.302. This Court granted leave to appeal by Order dated May 13, 2005, which also granted the motions for leave to file amicus curiae briefs.

Amicus Curiae Michigan State Medical Society supports the Appellees and urges affirmation of the decision of the Michigan Court of Appeals in *Michigan Chiropractic Council v Commissioner of Financial and Ins Service*, 262 Mich App 228; 685 NW2d 428 (2004).

STATEMENT OF QUESTION PRESENTED

Whether this Court should affirm the Court of Appeals' decision that Intervening Respondent's PPO conflicts with Michigan's no-fault statute where the PPO at issue limits medical benefits that are required by the statute.

The Circuit Court would say "yes."

The Court of Appeals would say "yes."

Michigan Chiropractic Council and Michigan Chiropractic Society say "yes."

Amicus Curiae Michigan State Medical Society says "yes."

Farmers Insurance Exchange and Mid-Century Insurance Co say "no."

The Insurance Commission did not appeal the Court of Appeals' decision

INTEREST OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY

Michigan State Medical Society ("MSMS") is a professional association that represents the interests of over 14,000 physicians in the State of Michigan. In this capacity, MSMS has frequently been called upon to express the views of its members relative to matters of interest to the health care community. The issue presently pending before this Court is such an issue.

MSMS' members routinely treat patients whose medical expenses are paid through the personal injury protection benefits of their automobile insurance policies. In enacting Michigan's No-Fault Automobile Insurance Act ("No-Fault Act"), 2500.3101 *et seq*; MSA 24.13101 *et seq*, the Legislature has directed that providers be reimbursed for these services on the basis of their reasonable and customary charges. The Farmers Insurance Exchange ("Farmers") Preferred Provider Organization Option ("Farmers' PPO") ignores this statutory requirement. It establishes a managed care system that requires insureds to obtain treatment from a specified network of health care providers, participants in Preferred Providers of Michigan ("PPOM"), and reimburses these providers at discounted reimbursement levels.

Farmers' PPO unilaterally alters both the manner in which health care services are delivered and the level at which they are paid. Managed care, with all of its attendant limitations and restrictions, replaces the "reasonable necessity" touchstone of the No-Fault Act. Similarly, under the Farmers' PPO, providers may not charge their reasonable and customary fee; they must accept whatever Farmers has designated for payment. The Court of Appeals properly perceived that managed care is inconsistent with, and in fact violates, the present statutory No-Fault framework. MSMS agrees with this decision and urges this Court to affirm.

STATEMENT OF FACTS

On August 10, 2000, Petitioners-Appellees Michigan Chiropractic Council and Michigan Chiropractic Society (collectively "Michigan Chiropractics" or "Petitioners") filed a complaint with the Insurance Commissioner and a request for a contested case hearing alleging, among other assertions, that Farmers' PPO was not authorized by, and in fact was a violation of, the No-Fault Act. The Insurance Commissioner denied the request by Order dated January 23, 2001. *See* Order Denying in Part Petition for Contested Case Hearing ("Order"), **Appellants' Appendix** at 63a.[1] The Insurance Commissioner concluded that Petitioners "have failed to show that statutory authorization is necessary to initiate the Preferred Provider Option" and that the PPO "is not inherently inconsistent with the requirement of section 3107 that no-fault coverage include 'all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.'" (**App Ax**, at 72a). The Insurance Commissioner dismissed the assertion that the PPO violates the rights of medical providers, stating: "Policyholders who elect the Preferred Provider Option voluntarily limit their choice of medical care providers to those participating in the PPOM network" and "[p]roviders who elect to participate in the PPOM network agree to provide their services at rates established by their agreement with PPOM." (**App Ax**, at 73a). The Insurance Commissioner side-stepped the argument that the No-Fault Act required that providers be paid their "reasonable and customary charges," not the lesser amount the PPO allows, stating that the No-Fault statute "does not confer a right on any particular provider or class of providers to be chosen to provide care" and providers could "voluntarily choose to provide care at less than their 'customary charge' in exchange for participation in a health care network that may tend to give them access to additional patients." (**App Ax**, at 135a).

[1] Appellants' Appendix is hereinafter referred to as "App Ax."

Michigan Chiropractics appealed the Insurance Commissioner's decision to the Ingham County Circuit Court. MSMS and Michigan Brain Injury Providers Council were permitted to file amicus briefs in support of Michigan Chiropractics' position. On April 30, 2002, Ingham County Circuit Court Judge Thomas L. Brown entered an Opinion and Order reversing the Order of the Insurance Commissioner and finding that the Farmers' PPO violated the No-Fault Act. *See* Opinion and Order dated April 30, 2002, **App Ax**, at 135a. The Court explained:

> Having fully reviewed the parties' respective briefs and supporting case law, as well as the Amicus brief and statement in support, the Court is persuaded by Petitioners' argument that Farmers' Option illegally adds an additional requirement that health care providers must be members of Farmers' exclusive Preferred Provider network. The Court agrees with Petitioners that this requisite conflicts with the Act's requirement that health care providers be reimbursed when providing treatment for a covered injury. Moreover, Petitioners have convinced the Court that chiropractors who wish to participate in the no-fault system for Farmers' insureds are forced to accept a fee which is less than the customary and reasonable fee required by the Act.
>
> . . . As stated by Petitioners, the authority to bring managed care to the no-fault system is a matter which the Legislature must determine. The Court applies this sound statement to the instant situation. Respondents' arguments to the contrary do not persuade the Court to reach a different conclusion. Accordingly, the Court is of the opinion that the Option at issue is not authorized by law.

Opinion and Order, **App Ax**, at 140a.[2]

The Circuit Court's decision was affirmed by the Court of Appeals in a June 1, 2004 opinion. *Michigan Chiropractic Council v Commissioner of Financial and Ins Service*, 262 Mich App 228; 685 NW2d 428 (2004). The Court of Appeals agreed that Farmers' PPO conflicts with and violates the No-Fault Act, and must be withdrawn. MSMS believes that the Court of Appeals' decision is correct and should not be disturbed. On behalf of its members, and

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[2] Upon motion by the Insurance Commissioner and Farmers, the Court amended its Opinion and Order on May 22, 2002 to dismiss Count III of the Petition as moot, in light of the Court of Appeals decision in *Sprague v Farmers Insurance Exchange*, 251 Mich App 260; 650 NW2d 374 (2002). The Order Amending Opinion and Order is included within **App Ax**, at 146a.

for the reasons discussed below, MSMS urges this Court to affirm the Court of Appeals' decision.

ARGUMENT

I. AN ADMINISTRATIVE DECISION ON A QUESTION OF FIRST IMPRESSION IS REVIEWED BY A CIRCUIT COURT DE NOVO WITH MINIMAL DEFERENCE TO THE ADMINISTRATIVE AGENCY

In its Order granting Leave to Appeal, this Court requested that the parties brief the issue of "the standard of review to be applied by the circuit court to the administrative decision denying the petition." *Michigan Chiropractic Council v Commissioner of Financial and Ins Service*, 2005 Mich LEXIS 1151.[3] Appellate courts "review the final decision of an administrative officer, in cases where a hearing is not required, to determine whether the decision was authorized by law. An agency's decision that is in violation of a statute . . . is a decision that is *not* authorized by law." *English v Office of Financial and Ins. Service*, 263 Mich App 449, 455; 688 NW2d 523 (2004).

Although an administrative agency's factual findings are generally accorded great deference, findings regarding statutory interpretation and application are reviewed de novo. *City of Romulus v MDEQ*, 260 Mich App 54, 62-64; 678 NW2d 444 (2003). In this case, the principal question before the Circuit Court was whether the Farmers' optional managed care endorsement is in violation of the No-Fault Act. This question "depends neither on resolution of disputed fact issues, a discretionary decision, nor any other matter that did not turn directly on statutory interpretation." *Ronan v Michigan Public School Employees Retirement System*, 245 Mich App 645, 648, n 1; 629 NW2d 429 (2001). Because this case involves only statutory interpretation and application – matters of law – the Circuit Court's review was properly de

[3] This Court also sought briefing as to whether Petitioners have standing to bring their petition. Because of its status as a non-party *Amicus Curiae*, MSMS does not address the standing issue in this Brief.

novo. *Id. at 648*; *City of Romulus*, *supra* at 64. In addition, the legal question in this case is one of first impression.[4] Appellate courts "review [a matter of first impression] de novo, according only minimal deference to the administrative construction of the statute." *Tyler v Livonia Public Schools*, 220 Mich App 697, 699 (1996).

Farmers' heavy reliance on *Brandon School Dist v MichiganEd Special Servs Ass'n, et al*, 191 Mich App 257; 477 NW2d 138 (1991), is misplaced. In *Brandon*, the appellant's sole claim was that the agency's determination was "arbitrary and capricious," and that "evidentiary support" of its claim existed. In rejecting the appellant's claim, the Court of Appeals noted that, ***with regard to the review of evidentiary matters***, "review is not de novo." *Id.* at 191 Mich App 263. *Brandon* recognized the rule that an agency's decision "must be affirmed *unless it is in violation of a statute.*" *Id.*, emphasis added. The agency's decision in this case ***was*** in violation of a statute (the No-Fault Act), and thus, the agency's decision was properly reversed by the Circuit Court. *City of Romulus, supra*; *Ronan, supra*. It is undisputed that no "evidentiary support" is at issue here, and the issues are limited to questions of law. Thus the Circuit Court's review is de novo, and *Brandon* is inapplicable.

Because the primary question before the Circuit Court involved a legal issue of statutory interpretation and an of first impression in this state, the proper standard of review was de novo, with little or no deference accorded to the administrative decision.

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[4] In its Opinion in this matter, the Court of Appeals noted that "[t]his case presents an issue of first impression." *Michigan Chiropractic Council v Comm'r of Financial & Ins Services*, 262 Mich App 228, 232 (2004).

II. THE COURT OF APPEALS PROPERLY HELD THAT FARMERS' MANAGED CARE PPO OPTION VIOLATES MICHIGAN'S NO-FAULT ACT

The primary question presented in this appeal is whether Farmers' optional managed care endorsement is permissible under the No-Fault Act. Because the Court of Appeals correctly held that Farmers' scheme violates the No-Fault Act, this Court should affirm.

The Michigan No-Fault Automobile Insurance Act was enacted as "an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or 'fault') liability system." *Shavers v Attorney General,* 402 Mich 554, 578-579; 267 NW2d 72, 77 (1978), cert den 442 U S 934 (1978). Its goal was to provide "assured, adequate, and prompt reparation for certain economic losses" to auto accident victims who would receive insurance benefits for their injuries as a substitute for their common law tort remedy. *Id.*

The No-Fault Act is remedial and must be liberally construed in favor of the persons intended to benefit thereby. *Gobler v Auto-Owners Ins Co,* 428 Mich 51, 61; 404 NW2d 199, 203 (1987). The Supreme Court in *Roberts v Mecosta Co General Hospital,* 466 Mich 57, 63; 642 NW2d 663, 667 (2002), described the rules of statutory construction that are to be followed:

> An anchoring rule of jurisprudence and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature. *People v Wager,* 460 Mich 118, 123 n7; 594 NW2d 487 (1999). To do so, we begin with an examination of the language of the statute. *Wickens v Oakwood Healthcare System,* 465 Mich 53, 60; 631 NW2d 686 (2001). If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone,* 463 Mich 558, 562; 621 NW2d 702 (2001). A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial Inc v Shacks Inc,* 460 Mich 305, 311; 596 NW2d 591 (1999).

The No-Fault Act is thus the "rule book" for deciding questions relating to the payment of personal injury protection benefits. *Rohlman v Hawkeye-Security Ins Co,* 442 Mich 520, 525;

502 NW2d 310, 313 (1993). Where the Act prescribes the mechanism to be followed regarding the payment of no-fault benefits, an insurer may not establish a conflicting mechanism in its policy. *See e.g., Cruz v State Farm Mutual Automobile Ins Co,* 466 Mich 588; 648 NW2d 591 (2002).

In *Cruz,* the Michigan Supreme Court held that a no-fault policy provision requiring an insureds to submit to an examination under oath ("EUO") as a condition precedent to receipt of no-fault benefits was unenforceable because it imposed greater obligations upon the insured than did the No-Fault Act. The Court explained:

> [W]e conclude that an EUO that contravenes the requirements of the no-fault act by imposing some greater obligation upon one or another of the parties is, to that extent, invalid. Thus, a no-fault policy that would allow the insurer to avoid its obligation to make prompt payment upon the mere failure to comply with an EUO would run afoul of the statute and accordingly be invalid.

466 Mich at 598. *See also DAIIE v Higginbotham*, 95 Mich App 213, 221; 290 NW2d 414, 418 (1980) ("Where an insurance policy contains an exclusionary clause that was not contemplated by the Legislature, that clause is invalid and unenforceable.").

The same analysis applies here. The No-Fault Act provides for the delivery of no-fault benefits on a fee-for-service basis. It does not authorize the creation of a no-fault managed care system that includes limitations, preconditions and penalties not prescribed by the Act. Section 3105 requires insurers to pay personal protection insurance benefits "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." MCLA 500.3105; MSA 24.13105. Section 3107 identifies the personal protection insurance ("PPI") benefits payable to the insured including, in subsection (1)(a), "[a]llowable expenses consisting of ***all reasonable charges*** incurred for ***reasonably necessary*** products, services and accommodations for an injured

person's care, recovery, or rehabilitation." MCL 500.3107; MSA 24.13107 (emphasis added). Section 3157 establishes the charges that must be paid to providers for services rendered to an insured. The statute states:

> A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may ***charge a reasonable amount*** for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution ***customarily charges*** for like products, services and accommodations in cases not involving insurance.

MCL 500.3157; MSA 24.13157 (emphasis added). As the Court of Appeals properly held, managed care benefits are inconsistent with these provisions.

A. THE NO-FAULT ACT MANDATES PRESERVATION OF THE INSURED'S CHOICE OF PROVIDERS AND REIMBURSEMENT OF PAYMENTS FOR ALL "REASONABLY NECESSARY" CARE

Farmers' PPO is inconsistent with the above provisions of the No-Fault Act because it limits the services that can be obtained, requires that the insured obtain those services from physicians who participate with Farmers' managed care partner, Preferred Providers of Michigan ("PPOM"), and pays for those services at discounted rates, irrespective of whether the provider has agreed to participate in PPOM. These restrictions are inconsistent with the No-Fault Act, under which the insured maintains the right to obtain reasonably necessary services from providers of his or her choice, and those providers are to be paid their reasonable and customary charges.

This Court has recognized that the No-Fault Act "preserves to the injured person a choice of medical service providers." *Morgan v Citizens Ins Co of America,* 432 Mich 640, 643; 442 NW2d 626, 627 (1989). *Morgan* arose under the Act's coordination of benefits provision, Section 3109(1), which states that "[b]enefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance

benefits otherwise payable for the injury." The insured, who was injured in an auto accident on his way to National Guard training, sought follow-up treatment at a nonmilitary hospital. His no-fault insurer refused to pay the expenses incurred and the Circuit Court upheld that denial, opining that the insured could not seek payment from his no-fault insurer for non-emergency care he received at a non-military hospital when the federal government was required by law to provide the medical service at a military hospital. This Court, however, rejected this interpretation of the no-fault statute, stating:

> The no-fault act preserves to injured persons a reasonable choice of hospitals and physicians although this may add to the premium cost of no-fault insurance. *The no-fault insurer cannot, in the name of reducing the premium cost, require an injured person to obtain medical services from a particular provider.*

432 Mich at 647-648emphasis added).[5] Similarly, in *Sprague v Farmers Ins Exch,* 251 Mich App 260, 271-272; 650 NW2d 374, 379 (2002), the Court of Appeals held that where the insured's HMO excluded coverage for chiropractic services, the no-fault insurer was liable to pay for the chiropractic expense to the extent that the charge was reasonable and was for a reasonably necessary service.

In this case, the Court of Appeals properly held that the statutory framework of the No-Fault Act is violated by the limitations imposed by Farmers' PPO stating:

> Managed care, in the form of a limited provider network, clearly was not contemplated in the no-fault range of choice system for medical benefits prescribed by § 3107. Farmers' system of PPO-limited medical benefits inherently conflicts with Michigan's no-fault act.

Michigan Chiropractic Council v Commissioner of Financial and Ins Service, 262 Mich App 228, 246; 685 NW2d 428 (2004). Unlike other premium and/or cost reducing provisions set

[5] The Court did not decide whether an injured person who contracted for a reduced premium under § 3109a, and thus had voluntarily agreed that other insurance would be primary for medical benefits, could seek recovery from a no-fault insurer unless he was unable to obtain medical care from a facility designated by the primary insurer. 432 Mich at 647.

forth in the Act, there are no provisions authorizing cost reduction trade-offs or limitations in § 3107. The Court explained:

> The fact that the Legislature expressly provided for reduced premiums in § 3109a with regard to coordinated health-care benefits, and also provided for the offset of duplicative government benefits and reduced premium rates for deductibles under § 3109, further supports a conclusion that the Legislature did not intend premium reductions with regard to benefit limitation options under § 3107. Under the rules of statutory construction, provisions of a statute must be read in the context of the entire statute so as to produce an harmonious and consistent whole. *Cherry Growers, Inc v Michigan Processing Apple Growers, Inc,* 240 Mich App 153, 170; 610 NW2d 613 (2000). "The omission of a provision in one part of a statute, which is included elsewhere in the statute, should be construed as intentional..." *Id.*
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> * * *
>
> Michigan's no-fault insurance system has as its core the premise - and the promise, of wideranging medical benefits from the available spectrum of providers, in exchange for which the driving public accepts the statutorily-prescribed, limited redress for personal injuries suffered. Farmers' PPO endorsement strikes a new and entirely different bargain with policyholders, one for which there are no legislative prescriptions. The fact that, absent such prescriptions, Farmers' has modeled its offered option after the statutory prescriptions for reduced premiums for optional coordinated health care, § 3109a, while laudable, is nonetheless essential proof that premium reductions for limited no-fault medical benefits under § 3107 were not within the Legislature's intent in enacting the no-fault act. *Where the Legislature contemplated limitations on § 3107 benefits, associated statutory requirements are provided in the act, not left to the insurers' devise.*

Michigan Chiropractic, 262 Mich App 244-245 (emphasis added)(footnotes omitted). The Court of Appeals further properly noted that the severe penalties the Farmers' PPO imposes when an insured obtains out-of-network services "clash with no-fault precepts, and further convince us that the endorsement must be rejected as inharmonious with the no-fault regime established by the Legislature." *Michigan Chiropractic, supra* at 246.

Farmers would have this Court believe that its PPO option "does not effect [sic] Farmers' no-fault liabilities to its insured - that is, to provide all reasonably necessary medical services" but that "once voluntarily chosen by an insured, the PPO Option merely defines the universe of

providers from whom the insured may obtain reasonably necessary medical treatment." (Farmers' Supreme Court Brief, p 26). However, by its explicit terms, Farmers' PPO not only limits the insured's choice of providers and the providers' fees, but also circumscribes, and imposes upon both patients and providers, its own definition of reimbursable services. The agreement Farmers would present to its insured for the Farmers' PPO states:

> It is agreed that the ***insurer and/or its designated health care review agency will manage the care, monitor, and review the appropriateness of health care services*** which are covered under my policy.

App Ax, at 45a, ¶ 1, emphasis added. Thus, far from merely "defining the universe of providers," Farmers' PPO would leave decisions as to the appropriateness of health care services to the insurer. This scheme clearly conflicts with the No-Fault Act's mandate that insureds be reimbursed for the cost of all "reasonably necessary" services.[6] MCL 500.3107; MSA 24.13107.

Further, as the concurring opinion of Judge White observes, under Farmers' PPO, "the insured only receives the full benefits mandated by the act if services are obtained from a managed-care provider." *Michigan Chiropractic, supra* at 248, White, J. concurring. If services are sought from a non-managed care provider, "a deductible that exceeds the amount permitted under the statute is incurred, and the amount to be paid for the reasonably necessary service will not be the reasonable charge, as required by statute, but the amount under the carrier's usual and customary fee schedule." *Id.* at 248, White, J. concurring. Judge White explained:

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[6] In fact, the Court of Appeals noted that the legislative enactment of No-Fault amendments (subsequently repealed by referendum) which would have authorized managed care in the No-Fault context, arguably supports the conclusion that the phrase "reasonably necessary" services in § 3107 "is incongruent with managed care concepts." The amendments would have substituted the term "medically appropriate" services for the phrase "reasonably necessary" services. See *Michigan Chiropractic, supra* at 246 n12.

> Stated differently, while the endorsement may provide the required coverage if the insured goes to a managed-care provider, it clearly does not provide the required coverage if the insured does not go to such a provider. This is a violation of the no-fault act.

Id. at 248, White, J. concurring.

Judge White noted the same discrepancy with respect to the insured's choice of providers:

> If the insured chooses to restrict his or her options in exchange for a premium reduction, and then after injury honors that choice, the statute is satisfied. However, if the insured chooses to seek reasonable services for a reasonable charge from a non-managed-care provider, and the insurer does not pay that charge, the no-fault statute has been violated.

Id. at 248, White, J. concurring. These are apt conclusions and underscore the inherent conflict that exists between Farmers' PPO and the No-Fault Act. The Court of Appeals' decision is proper and should be affirmed.

B. THE COURT OF APPEALS' DECISION IS NOT CONTRARY TO TOUSIGNANT

Farmers ignores the recognized distinction between coordinated health care benefits and no-fault benefits in touting *Tousignant v Allstate Ins Co*, 444 Mich 301; 506 NW2d 844 (1993), as evidence that this Court has already endorsed the legality of managed care no-fault benefits, and in asserting that *Tousignant* "is dispositive here." (Farmers' Supreme Court Brief, p 21). This Court recognized that distinction in *Auto Club Insurance Ass'n v New York Life Ins Co,* 440 Mich 126, 138-139; 485 NW2d 695, 701 (1992), stating:

> In *Federal Kemper Ins Co v Health Ins Administration, Inc, supra,* 424 Mich 550, we recognized that § 3109a was enacted as a means of controlling health care costs. One way of containing those costs is for an insurer to place dollar limits upon the amounts it will pay to doctors and hospitals for particular services. *While health and accident carriers generally are free to establish such limits, a no-fault insurer is not. Only the statutory qualification of reasonableness limits the amount that must be paid by a no-fault carrier for covered medical expenses.*

In fact, a simple reading of *Tousignant* demonstrates that Farmers has mischaracterized the issue, the arguments, and the holding of *Tousignant*. Farmers states that "this Court held that

the essential feature of a managed care system – a limited choice of physicians and hospitals – is not incompatible with the No Fault Act." (Farmers' Supreme Court Brief, p 21). Farmers further states that "the primary issue" in *Tousignant* "was the legality of the fundamental feature of managed care systems – a limitation on the insured's choice of physicians and facilities, *i.e.*, is it legal under the Act to exclude some physicians from being able to provide covered medical services to a no-fault insured?" (Farmers' Supreme Court Brief, p 21). Farmers also argues that: (1) this Court "held [in *Tousignant*] that the Act allows a limitation on choice of physicians and facilities if the limitation is the result of the insured's voluntary agreement," and (2) the Supreme Court "rejected the argument that § 3107 of the Act, which states that no-fault insurance must provide PIP benefits for all reasonably necessary medical services, requires the no-fault insured to be given a free choice of physicians and facilities." (Farmers' Supreme Court Brief, pp 20-21).

This Court's articulation of the facts, issues, arguments and holding in *Tousignant* belies Farmers' description of the case. *Tousignant* was a coordination of benefits case and the result in *Tousignant* was wholly dependent on that fact. The first sentence of the opinion states that:

> [t]he question presented concerns the liability of a no-fault automobile insurer when the insured purchases a policy of no-fault automobile insurance coordinated with other health coverage.

444 Mich at 303. The second sentence gives the holding:

> We hold that a no-fault insurer is not subject to liability for medical expense that the insured's health care insurer is required, under its contract, to pay for or provide.

Id.

In *Tousignant,* the insured, who had health insurance through an HMO, chose to coordinate her no-fault policy with her health care coverage pursuant to the coordination of

benefits provision in § 3109a. After sustaining injuries in an automobile accident, the insured obtained treatment at an HMO facility and was released. When she continued to experience pain, she sought treatment from a non-HMO physician and a non-HMO dentist. The insured did not claim that the treatment she obtained was unavailable or of inadequate quality at the HMO facilities. Relying on the coordination of benefits provision of the no-fault policy, her insurer refused to pay for the non-HMO treatment. This Court described the arguments the insured made in support of her assertion that the no-fault carrier should be required to pay for the non-HMO treatment. *The lawfulness or illegality of managed care PPI benefits was not among the arguments made.* Nor was it addressed in this Court's resolution of those arguments. This Court described the arguments as follows:

> Tousignant contends that coordination does not require that a no-fault insured seek all medical care from the health insurer.

444 Mich at 306, and:

> Tousignant stresses that neither § 3109a nor the no-fault policy states that a no-fault insured must seek medical care from a health insurer who is a health care provider, and that neither § 3109a nor the Allstate no-fault policy speak of a health insurer as the "primary insurer."

444 Mich at 307. This Court observed that Tousignant further argued:

> that when the no-fault insured does not seek medical care from the health insurer, but rather obtains medical care from other physicians of her choice, the health insurer is not then obliged to provide or pay for such medical care, and thus neither such medical care nor the expense of providing it is 'required to be provided' by the health insurer.

Id. To this, this Court replied:

> We conclude, however, that the legislative policy that led to the enactment of § 3109a requires an insured who chooses to coordinate no-fault and health coverages to obtain payment and services from the health insurer to the extent of the health coverage available from the health insurer.

Id. This Court explained its rationale:

> If a no-fault insured, who has chosen to coordinate no-fault and health coverages, could recover from the no-fault insurer medical expense obtainable from the health insurer, the legislative purpose – eliminating, in exchange for reduction in premium, health care coverage under a no-fault policy that is duplicative of health care coverage with a health insurer – would be defeated. Whether the controversy is between a no-fault and a health insurer, as in Kemper, or is between a no-fault insurer and a no-fault insured, as in the instant case, to make effective the legislative policy underlying § 3109a, the health insurer is the primary insurer to the extent the health insurer has agreed to pay for or provide necessary medical care.

444 Mich at 308.

This Court did not address the propriety of managed care PPI benefits or whether an insured could agree to limit its choice of health care providers *outside of the context of "other insurance" deemed primary pursuant to a coordinated benefits provision.* Its entire discussion of choice limitations derived from, and was dependent upon, the policy rationale underlying the coordination of benefits provision. As this Court explained:

> When the "other health coverage" coordinated with no-fault coverage is coverage by an HMO, the no-fault insured will thus have limited choice of physicians or facilities through the HMO. When the "other health coverage" coordinated with no-fault coverage is coverage by a health insurer who is not a health care provider (HMO), and thus the health insurer pays bills rendered by health care providers, the no-fault insured generally has a wide choice of physicians and facilities. Section 3109a, however, does not require that *"other health coverage,"* with which the no-fault insured has chosen to coordinate, provide the no-fault insured with such choice.
>
> Nor does the legislative policy embodied in § 3107, requiring a no-fault insurer to provide necessary medical expense, require that *"other health coverage"* under § 3109a provide the no-fault insured with a choice of physician or facility.
>
> *The no-fault insured may retain a wide choice of physicians and facilities by not coordinating.* Where, however, the no-fault insured's employer chooses to provide health insurance, or the no-fault insured chooses to obtain health insurance, from an HMO, and the no-fault insured chooses to coordinate no-fault and health coverages, the no-fault insured has, in effect, thereby agreed to relinquish choice of physician and facility;

444 Mich at 309-310 (emphasis added). This Court did not address whether an insured could voluntarily limit his or her choice of physicians outside the context of making "other coverage" primary pursuant to a coordination of benefits provision. If anything, the Court's statement that "[t]he no-fault insured may retain a wide choice of physicians and facilities by not coordinating" implies that no-fault benefits, in contrast to health benefits and other coverage, may not limit the insured's choice of providers.

Thus, the Court of Appeals did not "disregard" *Tousignant* and correctly noted that this Court's approval of managed care in the No-Fault context "relates only to managed care under health care plans, which only come into play under the no-fault statutory provisions for coordinated benefits." *Michigan Chiropractic, supra* at 241. The Court further explained:

> Managed care under the coordinated health and accident coverage of § 3109a is clearly distinguishable in concept from the general no-fault medical benefits under subsection 3107(1)(a), as are the legislative purposes underlying these provisions.

Michigan Chiropractic, supra at 243. Thus, in affirming the Circuit Court, the Court of Appeals properly considered and distinguished the *Tousignant* case.

C. THE NO-FAULT ACT REQUIRES THAT PROVIDERS BE PAID THEIR REASONABLE AND CUSTOMARY CHARGES

In addition to preserving an insured's choice of providers and requiring reimbursement of all payments for "reasonably necessary" services, the No-Fault Act requires providers to be paid their reasonable and customary charges, and preserves to providers the right to establish fees for their services. *See* MCL 500.3157 ("a physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person . . . ***may charge*** a reasonable amount . . . "). Farmers' plan to extract a reduced reimbursement agreement from no-fault providers directly conflicts with the No-Fault Act.

The Court of Appeals did not address this aspect of the challenge to Farmers' PPO, merely stating, in a footnote, that such argument would fail in light of the Court of Appeals' recent decision in *Advocacy Organization for Patients & Providers v Auto Club Ins Ass'n,* 257 Mich App 365, 373-374; 670 NW2d 569 (2003), which the Court of Appeals interpreted to mean that "[t]he statutory language in § 3157, referring to the amount the provider 'customarily charges,' is simply a cap on the amount health-care providers can charge" and "[p]roviders therefore have no entitlement to be reimbursed their customary charges." *Michigan Chiropractic, supra* at 262 Mich App 246, n 12. However, in affirming the *Advocacy Organization* decision, the Michigan Supreme Court did not have a similar interpretation of the Court of Appeals' *Advocacy Organization* decision. This Court summarized the Court of Appeals' ruling as follows: "[E]ven though a medical provider's charge does not exceed the amount that the provider customarily charges in cases not involving insurance, that fact alone does not establish that the charge is reasonable." *Advocacy Organization for Patients & Providers v Auto Club Ins Ass'n,* 472 Mich 91, 95; 693 NW2d 358 (2005). Further clarifying, this Court stated that the Court of Appeals "ruled that it is for the trier of fact to determine whether a medical charge, ***albeit 'customary,' is also reasonable***." *Id.,* emphasis added. Thus, this Court clarified that *Advocacy Organizations* requires a trier of fact to determine whether "customary" charges are ***also*** "reasonable." Based on this Court's decision in *Advocacy Organization*, a provider's charge must be ***both*** "customary" and "reasonable." *Advocacy Organization, supra* at 472 Mich 95.

Importantly, neither the Court of Appeals nor this Court addressed or determined whether imposing the reduced fees at issue in *Advocacy Organization* ***under a managed care no-fault option*** would violate the reimbursement provisions of the No-Fault Act. *Advocacy*

Organization, 257 Mich App 365; *affirmed*, 472 Mich 91. Numerous cases have held that Section 3157 allows providers to establish a level of reimbursement commensurate with their reasonable and customary charges and have rejected insurers' attempts to limit reimbursement to fee schedules. *See e.g., Hicks v Citizens Ins Co,* 204 Mich App 142; 514 NW2d 511 (1994) (concluding that *any agreement between Children's and Department of Social Services to limit the claim to the amount allowed for Medicaid benefits was unlawful and could not be relied upon by Citizens to avoid its obligation to pay reasonable and customary medical expenses*); *Mercy Mt. Clemens Corp v Auto Club Insurance Ass'n,* 219 Mich App 46; 555 NW2d 871 (1996) (rejecting assertion that information relating to hospital's charges under Medicare, Medicaid, Blue Cross, workers' compensation, HMOs, PPOs, was relevant to hospital's reasonable and customary charge because "this Court found that the insurer's argument that the hospital's charges could only approximate those payable by Medicaid was 'an untenable position in light of the unambiguous statutory language of [§ 3157], which clearly permits health care providers . . . to charge reasonable amounts not to exceed their customary charges in cases not involving insurance."); *Munson Medical Center v Auto Club Ins Ass'n,* 218 Mich App 375; 554 NW2d 49 (1996)(relying on *Hofmann v Auto Club Ins Ass'n,* 211 Mich App 55, 113; 535 NW2d 529 (1995), and stating that the *Hofmann* Court specifically noted that, "'while health and accident carriers generally are free to [place dollar limits upon the amounts they will pay to doctors and hospitals for particular services], a no-fault insurer is not... Only the statutory qualification of reasonableness limits the amount that must be paid by a no-fault carrier for covered medical expenses.'"). *See also, Auto Club Insurance Ass'n v New York Life Ins Co,* 440 Mich 126, 139; 485 NW2d 695 (1992).[7]

[7] While Farmers would have this Court believe that health care providers have voluntarily agreed

As the Court of Appeals recognized, it is not necessary to reach the question of whether the charges are "reasonable and customary" because the penalties and restrictions implicit in the Farmers' PPO violate the No-Fault Act. However, if this Court reaches the issue, this Court has clarified that payments to health care providers must be ***both*** "customary" and "reasonable." *Advocacy Organization*, *supra* at 472 Mich 95. The fees payable under the Farmers' PPO have no regard for this requirement.

D. THE DEFEAT OF MANAGED CARE AMENDMENTS TO THE NO-FAULT ACT, CONTAINED IN 1993 PA 143, EVIDENCES THE ABSENCE OF AUTHORITY IN THE PRESENT STATUTE FOR FARMERS' PPO

The Court of Appeals rejected "any argument" that a subsequent legislative effort to amend the No-Fault Act to provide for managed care "is determinative in this case." However, other courts have commented on such action and, although resolution of the issue is unnecessary to the conclusion reached by the Court of Appeals, subsequent legislative efforts are informative. Specifically, it is well-settled that legislative amendments are presumed to change the state of existing law. *See e.g., People v Price,* 124 Mich App 717, 721; 335 NW2d 134, 136 (1983). No change can be presumed to be without purpose. Rather, "when the Legislature adopts an amendment to a statute, it is presumed that the Legislature intended to make some change in existing law." *English v Saginaw County Treasurer,* 81 Mich App 626, 631; 265 NW2d 775, 777 (1978).

With 1993 PA 143, the Legislaturee enacted § 3104a to create a task force to implement a cost reduction plan examining the use of "managed care, preferred provider arrangements, case

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to accept reduced reimbursement by virtue of their participation in PPOM, this is not so. PPOM is a network that serves a base far broader than Farmers and its managed care no-fault alternative. One can assume that many, if not most, of PPOM's provider participants agreed to participate in PPOM before Farmers' PPO was created. Further, as Michigan Chiropractic Society and the Michigan Chiropractic Council indicate, Farmers' PPO refuses to pay any provider in excess of the PPOM rate, irrespective of whether the provider is a PPOM participant.

management, treatment protocols, utilization review, rehabilitation, and other contractual arrangements." The Legislature also enacted §3104b to permit automobile insurers to use clinical care management for each insured whose personal protection insurance benefits were not expected to exceed a specified dollar amount, and to require clinical care management for insureds whose PPI benefits were expected to exceed the specified dollar amount. Section 3107 was simultaneously amended to provide "benefits ... for ... [a]llowable expenses ... incurred for medically appropriate products, services, and accommodations for an injured person's care, recovery or rehabilitation." It also imposed a requirement that the health care services be "reasonably likely to provide continued effectiveness with respect to the injured person's care, recovery, or rehabilitation," and set up an internal review scheme to deal with disputes regarding medical appropriateness and medical necessity. *The present § 3107 requirement that insurers pay "all reasonable charges incurred for reasonably necessary products, services and accommodations" was expressly deleted.*

These provisions were necessary to implement the no-fault managed care PPO alternative that Farmers has since created. However, 1993 PA 143 never took effect. The Act was rejected by a referendum vote of Michigan citizens and its provisions are not the law.[8]

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[8] The Editor's notes following Sections 3104 and 3107 both state:

> Pub Acts 1993, No. 143, intending to amend this section, was to take effect 90 days after the close of the legislative session, or April 1, 1994. However, upon the submission of the requisite number of signatures, the effectiveness of Pub Act No. 143 was suspended pending outcome of a referendum, pursuant to the decision in *Farm Bureau Mutual Ins. Co. of Michigan v. Commission of Insurance (March 28, 1994) 204 Mich App 361, 514 NW2d 547,* 8 Mich L. W. 693. At the election held on Nov. 8, 1994, the referendum was defeated, therefore Pub Act No. 143 did not take effect.

Failed legislative proceedings entered into the Court of Appeals' decisional process in *Munson, supra.* In that case, the no-fault insurer, ACIA, unilaterally reduced its no-fault payments to hospital providers after Proposal D and subsequent attempts to amend the No-Fault Act to allow for reduced fee schedules, were defeated. The Court observed:

> In 1992, ACIA sought passage of a referendum, Proposal D, which would have permitted ACIA to pay no-fault claims according to fee schedules (and which required ACIA to reduce its premiums). Proposal D was soundly rejected. Again in 1994, ACIA attempted to obtain passage and approval of similar amendments, which would have expressly incorporated the worker's compensation fee schedules (footnote omitted) with an accompanying premium rollback. Again the effort was unsuccessful. Despite its failure to obtain an amendment of the no-fault law, ACIA nonetheless unilaterally implemented the result it wanted. ACIA's use of criteria imposed by other statutory schemes or contractual agreements is hereby rejected as a matter of law.

218 Mich App at 390.

Farmers' earlier effort to distinguish the failed legislative amendments as involuntarily imposed managed care, while the Farmers PPO is voluntarily selected by the insured, is unpersuasive. The point is that, in enacting the subsequently rejected amendments, the Legislature recognized that it was necessary to amend the No-Fault Act if a managed care system was to be allowed at all, and that the Act as it existed (and as it exists now) did not otherwise permit it. This fact was recognized by the Legislature in Hawaii, where the no-fault act expressly allows insureds to select managed care. HRS § 431:10C-302. Further, as Michigan Chiropractics argued to the Court of Appeals, if a managed care system fulfills an insurer's obligation to provide no-fault benefits under the present statute, an insurer could conceivably decide not to offer fee for service-based coverage at all, negating the "voluntary choice" argument upon which Appellant relies so heavily.

E. POLICY ARGUMENTS AS TO THE PURPORTED BENEFITS OF MANAGED CARE IN THE NO-FAULT ACT ARE MATTERS FOR LEGISLATIVE, NOT JUDICIAL, CONSIDERATION

In this appeal, *Amici Curiae* from the insurance industry have urged this Court to allow Farmers' PPO (and other managed care programs) to be implemented under the No-Fault Act. In doing so, these *Amici* have gone beyond legal arguments to argue the policy behind managed care programs. Indeed, insurance industry trade group The Insurance Institute of Michigan ("I.I.M.") filed an *Amicus* brief detailing the purported benefits of managed care programs. (See I.I.M. Amicus Brief, pp 4-5, 18-24; *see also Amicus* brief filed by PPOM, LLC). For example, I.I.M. argues that the Court of Appeals "ignored the ultimate effect of its decision, which would preclude drivers without health or accident coverage from ever obtaining the advantages of group health insurance discounts." (I.I.M. Amicus Brief, p 6). I.I.M. goes on to state:

> [R]ising health care costs are at the forefront of our national concerns, and drivers without independent health coverage will feel the most abrupt effect of those costs in their no-fault insurance rates. Yet the Court of Appeals saw fit to deny these drivers *the option of selecting* a 40% discount on no-fault insurance premiums, apparently because the Court felt that they could not be trusted to choose in their own best interests.

I.I.M. Amicus Brief, pp 18-19 (emphasis in original). Without commenting on the merits of I.I.M's statements, there is no question that the arguments are related to *policy*, not to the legal question before this Court. Such policy matters are the exclusive province of the Legislature. As stated by this Court:

> [P]olicy decisions are properly left for the people's elected representatives in the Legislature, not the judiciary. The Legislature, unlike the judiciary, is institutionally equipped to assess the numerous trade-offs associated with a particular policy choice.

Devillers v ACIA, ___ Mich ___; ___ NW2d ___ ; 2005 Mich LEXIS 1313 at *44 (2005). Appellant and the *Amici* supporting it in this matter are free to petition the Legislature for any

changes to the No-Fault Act it perceives are warranted.[9] However, it is not the judiciary's place to address policy concerns. *Id.* Indeed, in rejecting similar arguments made before it, the Court of Appeals in this matter stated:

> Managed care, and in particular, the PPO option at issue, fundamentally alters the essential premise of Michigan no-fault insurance and is inconsistent with the no-fault act general benefit provisions. *Incorporating managed care into the no-fault scheme, however beneficial or desirable from a policy standpoint, cannot emanate from the innovations of insurance companies or the courts, but only from the Legislature itself.*

Michigan Chiropractic, supra at 262 Mich App 246 (emphasis added).

Because policy decisions are properly left for the Legislature, this Court should disregard any policy arguments regarding the purported benefits of managed care within the No-Fault system.

III. THE COURT OF APPEALS PROPERLY HELD THAT THE PURPORTED SAVINGS OF THE FARMERS' MANAGED CARE PPO OPTION IS ILLUSORY AND POTENTIALLY DECEPTIVE

The Court of Appeals properly held that the potentially deceptive and illusory cost savings provision of the Farmers' PPO is an additional basis for reversing the approval granted by the Insurance Commissioner. As the Court explained:

> [I]f a policyholder elects the PPO option, the policyholder forfeits other PIP premium deductions. This "exchange system" of premium discounts renders illusory the touted reduction in the cost of insurance to policyholders. The question arises whether consumers, who are prone to overlook the detail of their insurance policies, will be lured to accept the PPO option on the basis of the well-publicized forty-percent reduction in their PIP rate, when in fact many will lose significant, and perhaps comparable, premium discounts for the other insurance option or the E-7143, already in place, but which no longer apply. This system certainly has the potential for deception - misleading consumers and the public in general. This potential deception provides further basis for reversing the commissioner's decision pursuant to MCL 500.2029, on the basis of unfair, deceptive, and misleading trade practices.

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[9] As set forth above, the Legislature was convinced to enact managed care amendments to the No-Fault Act in passing 1993 PA 143. However, the Act was rejected by a referendum vote of Michigan citizens and its provisions are not the law.

Michigan Chiropractic, supra at 240-241.

In response to the Court of Appeals' holding on this issue, Appellant argues that the Court of Appeals was not authorized to decide the issue because it was not raised below. However, abundant case law clarifies that, in cases such as this, where the issue is a matter of law and the facts necessary for its resolution are in the record, an appellate court may properly review an issue. *Manning v City of Hazel Park*, 202 Mich App 685, 699; 509 NW2d 874 (1993); *Adam v Sylvan Glen Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992). Furthermore, an appellate court is "empowered . . . to go beyond the issues raised and address any issue that, in the court's opinion, justice requires be considered and resolved." *Michigan v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999); *Paschke v Retool Industries*, 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502; 519 NW2d 441 (1994).

The Court of Appeals' findings regarding the potentially deceptive nature of Farmers' PPO was not necessary to the holding that Farmers' PPO conflicts with the No-Fault Act. Thus, this Court may affirm the Court of Appeals decision without addressing this issue.

RELIEF REQUESTED

Amicus Curiae Michigan State Medical Society therefore requests that this Court affirm the decisions of the Circuit Court and Court of Appeals, and deny all forms of relief requested by Appellants Farmers Insurance Exchange and Mid-Century Insurance Company.

Dated: August 26, 2005

Respectfully submitted,

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